In The

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 400

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; and others,

Appellants,

vs.

United States of America; Interstate Commerce Commission; C.&R. Trans., Inc.; and others,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF OPPOSING MOTIONS TO AFFIRM

Pursuant to Rule 16, paragraph 3, appellants submit the following brief opposing appellees' motions to affirm. Two motions have been filed: By the Interstate Commerce Commission and by the private appellees. This brief opposes both motions.

Each motion asserts that the allegations of paragraph 20 of the complaint (St. as to Juris. pp. 38-39) together with the rest of the complaint are insufficient to show that appellants are parties in interest entitled to maintain the action. This contention is without merit. As a part of their argument appellees rely upon an obviously erroneous construction of *Alton Railroad Co.* v. *United States,* 315 U.S. 15.

THEIR STATUS AS COMPETITORS OF THE INVOLVED MOTOR CARRIERS GIVES APPELLANTS STANDING AS PARTIES IN INTEREST ENTITLED TO SUE

Appellants allege that they serve all of the points served by the various large motor carriers which the Commission's void order placed under common control in violation of section 5 of the Interstate Commerce Act, 49 U.S.C. 5, and that they are *competitors* of such motor carriers in the transportation of freight. The District Court, and appellees in their motions, thought this was not enough, and apparently attached no significance to the allegation that appellants are *competitors* of such motor carriers.

In this the District Court and appellees are in plain error. The Interstate Commerce Act, other Federal statutes, and the decisions of this Court establish that the word "competitor" as such describes a factual status of wide significance. "Competitor" includes the concept of economic injury resulting from illegal administration of laws designed to regulate competitive conditions. The status of competitor makes one a party in interest entitled to challenge such illegal administration. This Court so held in *Alton Railroad Co.* v. *United States, supra,* 315 U.S. 15, which of course gives rise to appellees' attempts to distinguish that case from this.

The Interstate Commerce Act uses the word "competitor" and "competitive" many times to forbid or to authorize action by one carrier in relation to another carrier or a shipper.[1] ("The word 'competition' imports the existence of present or potential competitors." *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 649.) The National Transportation Policy forbids "unfair or destructive competitive practices" and obviously that would include illegal competitive practices.

In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87, the Court said in respect to a Commission proceeding, like the instant case, under section 5(2):

> "Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the antitrust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on *competitors* and on the general *competitive* situation in the industry in the light of the objectives of the national transportation policy." (Emphasis added).

The Commission's regulations governing applications for new motor carrier operating authority, and for authority to consolidate existing motor carriers under unified control, contain the following identical provisions (49 C.F.R. §§168(b), 180.1(b), 180.6(b), 180.50(b)):

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[1] National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding section 1; 49 U.S.C. sections 4(1)(2), 5(1), 5(2)(b), 5(14)(15)(16), 15(8)(11), 318(b), 322(e), 903(e)(2), 904(d), 905(c), 907(h), 917(f), 1021(f).

An example is 49 U.S.C. 5(2)(b) which requires, for approval of acquisition of a motor carrier by a railroad, a finding that the transaction "will not unduly restrain competition."

> "Applicant is not required to give notice to *competitors* since notice of such filing will be by publication in the Federal Register, as provided in §§ 1.240 and 1.241 of this Chapter." (Emphasis added).

In discussing a procedural matter the Commission said in *Paulmaur Transportation Co. Motor Carrier Application*, 28 M.C.C. 395, 399:

> "Such petition, being akin to a new application, should be served on all carriers by rail, motor, and water, known to applicant, with whose services the operations covered thereby are or will be directly *competitive.*" (Emphasis added).

In every Annual Report for the past twenty years the Commission has discussed at length the "intense competition" between railroads and motor carriers, saying that "motor carriers are strong competitors of the railways." See, for example, the footnote on page 12 of the Statement as to Jurisdiction.

This Court clearly recognized the full meaning of "competitor" in its use of the word in the *Alton* case, 315 U.S. pp. 18-19.

In view of the wide use of the word "competitor" in the Interstate Commerce Act, in the Commission's regulations, decisions, and Annual Reports, and in the decisions of this Court, all for the purpose of expressing a well known factual concept, it is clear that the allegations of paragraph 20 of appellants' complaint (St. as to Juris. pp. 38-39), admitted of course by the motions to dismiss, establish that appellants are parties in interest.

THE *ALTON* CASE CONSIDERED THE VALIDITY OF AN ORDER AUTHORIZING ONLY THE CONTINUANCE OF EXISTING MOTOR CARRIER RIGHTS. IT IS CLEAR AUTHORITY THAT APPELLANTS ARE PARTIES IN INTEREST

In attempting to distinguish the *Alton* case (315 U.S. 15) from this, appellees assert a construction of that case which is wholly at variance (a) with its obvious meaning, (b) with the construction placed upon the case by subsequent decisions of this Court, and (c) with the construction of the case asserted in various briefs and motions to affirm filed in this Court by the Commission.

The *Alton* case was discussed in our Statement as to Jurisdiction, pages 10-14. The significance of appellees' treatment of it in their motions is the following. Despite the plain fact that the *Alton* case involved only "grandfather" rights, that is, the continuance of *existing* operations, appellees assert that the case involved a grant of *new* motor carrier authority; whereas, they say, the instant order authorized only continuance of existing operations. Appellees apparently led the District Court into the same error, since the District Court said in respect to the *Alton* case (St. as to Juris. p. 23; 130 F. Supp. pp. 78-79) that "the order of the Commission directly affected the transportation situation by granting *new operating rights* which threatened the railroads' traffic". (Emphasis is District Court's).

The Commission's motion to affirm states in part in respect to the *Alton* case (p. 12):

> "Thus, the order in the *Alton* case was entered under section 206(a) of the Act, and involved a specific grant of authority which had the effect of enabling the applicant to expand its operations greatly beyond the limited points it was then serving."

The other moving appellees make the same assertion. (p. 6).

Such a construction of the *Alton* case is totally erroneous. The truth is that the *Alton* case has been the outstanding case, the landmark case, cited by this Court on the proposition that authority granted under the "grandfather" clause must be so limited as to assure no more than "substantial parity between future operations and prior *bona fide* operations." That phrase first appeared in the *Alton* case, 315 U.S. p. 22. Since then it has been quoted with the *Alton* case citation in at least five of the Court's opinions.[2] An example of its use is the following from *Noble* v. *United States*, 319 U.S. 88, 92:

> "If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior *bona fide* operations' which is contemplated by the Act (*Alton R. Co.* v. *United States*, 315 U.S. 15, 22) would be frequently disregarded. The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935."

In *Crescent Express Lines* v. *United States*, 320 U.S. 401, the Commission said in its motion to affirm (pp. 6-7):

> "Under this language the Commission can and must attach limitations, whether geographic or otherwise, to insure the 'substantial parity between future oper-

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[2] *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 481; *Noble* v. *United States*, 319 U.S. 88, 92; *Crescent Express Lines* v. *United States*, 320 U.S. 401, 409; *Barrett Line* v. *United States*, 326 U.S. 179, 193; *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 448-449.

> ations and prior *bona fide* operations' which the 'grandfather' clause contemplates. *Alton R. Co.* v. *United States,* 315 U.S. 15, 22; * * *"

The Commission stated the same position in its motions to affirm and briefs in the *Noble* and *Barrett Line* cases cited in footnote 2.

Moreover, in its brief filed in this Court in the *Alton* case (p. 33) the Commission urged that the railroads were not parties in interest *because the case involved only the continuance of existing authority and not a grant of new authority.* The Commission is now attempting to put precisely the opposite construction on the *Alton* case: That it is not in point in the instant case because it involved a grant of new authority and not just the continuance of existing authority.

Obviously, the *Alton* case involved only the continuance of "grandfather" authority. It did not countenance the grant of new authority in a "grandfather" case. That is entirely clear from the opinion alone. Its holding has been emphasized by its citation (footnote 2) as the leading authority that the "grandfather" clause must be scrupulously administered to avoid the granting of new authority.

Thus the *Alton* is direct authority that appellants are parties in interest in the instant case, as pointed out in our Statement as to Jurisdiction, pages 10-14. Appellees' attempts to distinguish the *Alton* case from the instant case are utterly lacking in validity; they only emphasize the total want of merit in appellees' contentions.

The cases cited in appellees' motions which have held that various parties were not parties in interest entitled to sue are not in point in this case. Not one of such cases involved the status of a competing carrier as a plaintiff.

On the other hand, in every case, so far as we can find, where the question has come before this Court it has been held that a regulated agency is a party in interest entitled to maintain a suit to review an order of the regulatory commission granting rights to a competitor. Appellees have not cited any cases holding the contrary. The principal cases are cited in our Statement as to Jurisdiction.

Baltimore & Ohio Railroad Co. v. *United States,* 264 U.S. 258, holds that an order made under section 5(2), as in the instant case, is subject to review in a suit by a competitor. The *Alton* case (315 U.S. 15) adds to that the holding that railroads are parties in interest in a suit challenging the validity of an order affecting competing motor carriers. Appellees have failed to state any valid reasons why appellants are not parties in interest.

Conclusion

It is clear that appellants are parties in interest under the allegations of their complaint. Appellees' motions to affirm should be denied and the Court should note probable jurisdiction.

Respectfully submitted,

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Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division

APPELLANTS' PETITION FOR REHEARING

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